TABLE OF CONTENTS

	Page
Table of Cases	(ii)
Table of Statutes	(ii)
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting Writ	8
Conclusion	17
Appendix A – Opinion of the Court of Appeals dated August 15, 1972	18
Appendix B – Decision and Order issued by N.L.R.B April 28, 1971	27
Appendix C – Trial Examiner's Decision and Order January 25, 1971	29

TABLE OF CASES

Page

Mastro Plastics Corporation v. *N.L.R.B.*,
350 U.S. 270, 280 (1956) 10

N.L.R.B. v. *C & C Plywood Corp.*,
385 U.S. 421 (1967) 14

N.L.R.B. v. *Duncan Foundry & Machine Works*,
435 F. 2d 612, F.N. 8 (C.A. 7, 1970) 15

N.L.R.B. v. *Great Dane Trailers*,
388 U.S. 26, 34 (1967) 9, 13-16

N.L.R.B. v. *Rockaway News Co.*,
345 U.S. 71, 80 (1953) 10

Roegelein Provision Co., 181 N.L.R.B. No. 72,
73 L.R.R.M. 1396 (NLRB-1970) 10, 11, 15

Tex Tan Welhausen Co. v. *N.L.R.B.*,
419 F. 2d 1265, 1271 (5th Cir. 1969) 13

TABLE OF STATUTES

National Labor Relations Act § 7
(29 U.S.C. §157) 3

National Labor Relations Act §§ 8 (a) (1), (a) (3)
(29 U.S.C. § 158) 3, 4, 6

COPY BOUND CLOSE IN CENTER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

• • • •

JEMCO, INC.,
Petitioner,

—vs—

NATIONAL LABOR RELATIONS BOARD
Respondent.

• • • •

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

• • • •

Petitioner, Jemco, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on August 15, 1972.

OPINIONS BELOW

The opinion of the trial examiner for the National Labor Relations Board holding that Petitioner violated Section 8(a) (1) and 8 (a) (3) of the National Labor Relations Act is printed in Appendix C hereto. The opinion of the National Labor Relations Board finding that Petitioner had violated Sections 8(a) (1) and 8(a) (3) of the National Labor Relations Act is recorded at 190 NLRB No. 36, 77 LRRM 1163 (1971) and is printed in Appendix B hereto. The opinion of the Sixth Circuit Court of Appeals enforcing the order of the National Labor Relations Board, is printed in Appendix A hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, is entered on August 15, 1972. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1) When the collective bargaining agreement negotiated between the Union and the Petitioner specifically states that vacation benefits are benefits which do not accrue and are not a vested right, can the Court of Appeals ignore such clear and unambiguous contract language, negotiated and agreed to in "give and take" negotiations with the Union, in finding that the Petitioner committed unfair labor practices, in violation of Sections 8(a) (1) and 8(a) (3) of the National Labor Relations Act by failure to pay vacation benefits to employees after the contract terminated.

2) Whether the Court of Appeals has properly construed the "Great Dane doctrine" in finding that the Petitioner engaged in conduct which adversely affected employees'

OPY BOUND CLOSE IN CENTER

rights and that the Petitioner failed to justify that conduct by coming forth with a legitimate business objective, regardless of whether that conduct was discriminatory under 8(a) (3) or merely coercive under Section 8(a) (1), where the conduct complained of was the Petitioner's action in withholding vacation benefits through proper application of contractual provisions negotiated with the collective bargaining agent of the employees, specifically to cover situations such as contract termination.

STATUTORY PROVISIONS INVOLVED

Sec. 7, National Labor Relations Act, 29 U.S.C. Section 157:

> Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

Sec. 8, National Labor Relations Act, 29 U.S.C. Section 158(a) (1), (a)(3):

> (a)(1) – It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees – in the exercise of the rights guaranteed in section 157 of this title.
>
> (a)(3) – It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . ., and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

Jemco, Inc., is a small precision machining enterprise located in Buchanan, Michigan. On April 30, 1969, the employer and Union entered into a three-year agreement covering the employer's plant employees. A provision in that contract provided for a wage reopener on sixty (60) days' notice prior to May 1, 1970. The reopening provision also states that if the parties are unable to reach an agree-

ment for continuation of the contract, that all terms and conditions shall cease to have effect and neither party shall be bound thereby. Article XXII, Section 2 reads as follows:

> The foregoing notwithstanding, either party hereto may elect to reopen this Agreement for the purpose of negotiating changes in the wage rates in Exhibit "A" hereof by notification to the other in writing at least sixty (60) calendar days prior to April 30, 1970, and/or April 30, 1971. In the event that the contract is reopened in accordance with this Section and the parties are unable to agree upon the terms for continuation of this Agreement, then effective May 1, 1970, and /or May 1, 1971, as the case may be, all of the terms and conditions set forth in this Agreement shall cease to have effect and neither party shall be bound thereby.

The Union gave the required notice, and negotiations ensued. The parties were unable to reach an agreement, and the Union called a strike commencing May 1, 1970.

All bargaining unit personnel went on strike. However, one Union member returned to work in August of 1970.

On July 3, 1970, the Union requested payment of the vacation benefits for its members, and the Petitioner responded that payment would not be made because the company was not "legally obligated for payment of vacation pay." It was the Petitioner's position that though it was not legally obligated to pay vacation benefits, that it was still willing to negotiate with the Union over payment of the benefits.

The collective bargaining agreements entered into in 1966 and 1969 stated with regard to vacations at Article XVI, Section 2:

> In no case shall vacations be considered a vested interest.

When the collective bargaining agreement terminated on May 1, 1970, "all terms and conditions" in the agreement "ceased to have effect" and the employer's legal responsibility for payment of the vacation benefits ended due to the express nonvesting nature of those benefits.

It is important to note that all striking employees, employees abandoning the strike, and replacement employees were treated the same. None of these employees was granted vacation benefits.

On August 18, 1970, the Union[1] filed with the National Labor Relations Board amended unfair labor practice charges alleging that the employer had coerced and discriminated against striking employees by failure to pay vacation benefits allegedly due and owing. As a result of those charges, Region 7 of the National Labor Relations Board issued a complaint in support of the unfair labor practice charges on October 14, 1970. A hearing was held on the charges before Trial Examiner Paul E. Weil. The trial examiner held that the employer had engaged in coercive and discriminatory conduct by failing to make payment of certain vacation benefits to striking employees for which they had qualified under the contract. (Appendix C, p. 35). On March 3, 1971, the employer filed exceptions to the trial examiner's decision with the National Labor Relations Board denying that any accrued vacation rights were owing to the employees when the contract was terminated with the Union May 1, 1970, and denying any coercive or discriminatory conduct in violation of Sections 8(a) (1) and 8(a) (3) of the Act. On April 28, 1971, the National Labor Relations Board issued a decision and order adopting the decision and order of the trial

[1] United Steelworkers of America, AFL-CIO.

examiner with slight modification (Appendix B, p. 27) The employer, disagreeing with the rationale and decision of the National Labor Relations Board, refused to abide by its order. The National Labor Relations Board applied for an enforcement of its order with Sixth Circuit Court of Appeals on October 13, 1971. The employer answered the petition of the National Labor Relations Board for enforcement on October 20, 1971, asking that this Court deny the National Labor Relations Board's prayer for enforcement. On August 15, 1972, the U.S. Court of Appeals for the Sixth Circuit issued a decision enforcing the order of the National Labor Relations Board. (Appendix A, p. 26).

The Court of Appeals refused to consider the clear and unambiguous contract language which unmistakably defines the parties' rights dealing with their collective bargaining relationship as established by the National Labor Relations Act. The Court chose to ignore the Petitioner's legal rights as defined by the contract and spoke directly to the question of whether the company's attempt to set off its legal costs relating to employee strike activity against vacation benefits, (which it incorrectly assumes accrued under the contract) constitutes a legitimate objective so as to satisfy the Petitioner's burden under the "Great Dane doctrine."

In so holding, the Court of Appeals has failed to recognize the sanctity of a collective bargaining agreement in the labor relations arena and has improperly applied the "Great Dane doctrine" dealing with employer discriminatory conduct and the burden of proof required to justify such conduct. To allow this decision to stand establishes a rule of law which prohibits an employer to negotiate binding contract language in "give and take" labor negotiations, which limits its legal obligation to provide employees with fringe benefits.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT COURT IN REFUSING TO GIVE EFFECT TO UNAMBIGUOUS CONTRACT LANGUAGE NEGOTIATED IN A "GIVE AND TAKE" COLLECTIVE BARGAINING ATMOSPHERE BETWEEN THE PETITIONER AND UNION, HAS ESTABLISHED A PRECEDENT WHICH ALLOWS THE COURTS TO IGNORE OR MODIFY COLLECTIVE BARGAINING AGREEMENTS IN ORDER TO ESTABLISH OR JUSTIFY A DESIRED JUDICIAL RESULT.

There existed no contractual obligation on the part of the Petitioner for payment of vacation benefits after the collective bargaining agreement was terminated, where such benefits were expressly not a vested right.

Vacation benefits had been contractually provided for during the period of time that the Petitioner had been under contract with the Union. Vacation benefits were paid during that period to those employees who met the contractual requirements.

It is not contended that the vacation benefits were forfeited because the employees were on strike as the National Labor Relations Board originally argued. The vacation benefits were legally forfeited when the Union failed to reach a settlement on a contract after requesting reopening of the contract under Article XXII, Section 2. This result would have been obtained irrespective of any strike action.

The nonvesting contract language contained in Article XVI was negotiated by the Petitioner in "give and take"

negotiations and was intended by the Petitioner to apply in such circumstances as contract termination.

Yet, the Court of Appeals, in its decision (Appendix A, p. 22) stated:

> We conclude that the Board could and did properly find that the Company's denial of vacation pay to all employees in the wake of their first strike in the history of the company was "discriminatory conduct which could have adversely affected employee rights to some extent," when vacation benefits had been paid every year prior to the strike.

At footnote 8 to the above statement, the Court said:

> The Board's finding that the Company's denial of vacation benefits was discriminatory conduct within the terms of *Great Dane* is in no way negated by the Company's contention that vacation benefits were paid in prior years under the terms of an operative contract, whereas the contract provisions upon which the Company relies to justify its denial of vacation benefits must be taken simply that its discriminatory conduct was motivated by legitimate and substantial business objectives. The Company's contractual defense, however meritorious it may be, does not detract from the Board's initial finding that the Company's conduct was discriminatory.

It must be remembered that the withholding of vacation benefits was based on the Petitioner's position that, due to the termination of the contract, that all obligations of either party under the contract pursuant to Article XXII, Section 2, coupled with the nonvesting language in Article XVI, Section 2, that vacation benefits ceased to become a fixed obligation and thus only subject to further negotiation. The Board and Court of Appeals indicate that not only is the withholding of vacation benefits discriminatory and coer-

cive, but that the act of attempting to set-off vacation benefits against legal costs incurred due to employee strike activity is also coercive and discriminatory in and of itself. It is submitted that in order to come to such a conclusion, that it must first be determined whether, under the collective bargaining agreement, the vacation benefits were an enforceable obligation at all. Offering to pay, at least in part, during negotiations, monies which are not legally owed is hardly discriminatory.

Certainly, employee rights, like the right to strike or the vesting of certain fringe benefits may be surrendered or waived by the appropriate provisions in a collective bargaining agreement. *Mastro Plastics Corporation* v. *N.L.R.B.* 350 U.S. 270, 280 (1956). In discussing curtailment of employees' rights, the Supreme Court said in *N.L.R.B.* v. *Rockaway News Co.* 345 U.S. 71, 80 (1953):

> This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular business involved.

Under established case law, certain fringe benefits like vacation pay are deemed to accrue or vest to the employee as he performs services for the employer. However, like the right to strike, vacation rights may be limited by express contract language.

The National Labor Relations Board has recently decided a case which deals almost directly with this issue. In the case of *Roegelein Provision Co.*, 181 NLRB No. 72, 73 LRRM 1396 (NLRB-1970), the trial examiner held that the employer discriminated against striking employees by refusing to count strike time toward vacation eligibility in

spite of the contract language to the contrary. The contract provided that an employee absent from work for more than 200 hours during the contract year (except for certain specified reasons) would not be entitled to vacation benefits. The Board, in reversing the trial examiner's holding, said:

> We are persuaded by the affirmative evidence on the record that the denial of vacation benefits has been satisfactorily demonstrated to be a lawful implementation of a right understood to have been acquired through the collective bargaining process, from which conduct no inference of improper motive should be drawn.
>
> The resulting contract language was plain and unambiguous . . . There could be no confusion as to its intended impact upon reinstated strikers.

In the present case, as in the *Roegelein* case, the terminal nature of the contract as set out in Article XXII, Section 2, coupled with the nonvesting provision of Article XVI, are limitations on the parties' legal rights born out of collective bargaining process between the employer and the statutory representative of the employees. A failure of the Board and the Court of Appeals to view the applicable contract language in evaluating the legal position of the parties has resulted in the incorrect finding of improper and illegal motive on behalf of the employer, and totally ignores the legal scope of the collective bargaining agreement which the parties executed, being fully aware of the potential effect and consequences of the contract termination on the vacation pay provisions. To allow this decision to stand would establish the vesting of vacation benefits regardless of language written into the contract through the collective bargaining process. Such a rule of law substantially erodes the viability and flexibility of collective bargaining agreements with regard to definition and limita-

tion of both employer and employee rights and is patently contrary to the spirit of modern labor decisions and legislation.

II.

THE SIXTH CIRCUIT'S FINDING OF DISCRIMINATION AND ITS STATEMENT THAT THE BURDEN ON THE EMPLOYER PRESCRIBED IN *GREAT DANE* ARISES ONCE IT IS ESTABLISHED THAT THE EMPLOYER ENGAGED IN CONDUCT WHICH ADVERSELY AFFECTED EMPLOYEE RIGHTS, REGARDLESS OF WHETHER THAT CONDUCT WAS DISCRIMINATORY UNDER SECTION 8(a) (3) OR MERELY COERCIVE UNDER SECTION 8(a) (1), APART FROM THE APPLICABLE CONTRACTUAL PROVISIONS, WRONGFULLY APPLIES THE RULE OF *GREAT DANE* AND IGNORES THE FACT THAT THE PETITIONER'S ACTION WAS MOTIVATED BY RIGHTS ESTABLISHED BY THE COLLECTIVE BARGAINING AGREEMENT FROM WHICH CONDUCT NO INFERENCE OF IMPROPER CONDUCT SHOULD BE DRAWN.

The original complaint issued by the Seventh Region of the National Labor Relations Board stated that Petitioner refused to make vacation benefit payments because of the strike of its employees alleging that such conduct is inherently discriminatory and that no proof of underlying improper motive is necessary. Strangely, however, the Sixth Circuit, in affirming the National Labor Relations Board which affirmed the trial examiner, stated:

> In view of this evidence of the Company's position respecting the vacation pay, we find that the trial examiner correctly determined that the real issue before him was not whether the Company had a legal

> obligation under the contract to pay the vacation benefits, but rather, the question of whether the Company's attempt to set off its legal costs against vacation monies which had otherwise accrued under the contract constituted a legitimate objective so as to satisfy the Company's burden under *Great Dane*. (Appendix A, p. 25).

In citing *Tex Tan Welhausen Co.* v. *N.L.R.B.*, 419 F. 2d 1265, 1271 (5th Cir. 1969) the Sixth Circuit said at note 7:

> It is noteworthy that our determination that the Board properly applied Section 8(a) (3) in the present case is not a prerequisite to our enforcement of the affirmative relief and the portion of the prohibitive remedy respecting the Company's Section 8(a) (1) conduct, as required under the Board's order. We believe, as did the Court of Appeals for the Fifth Circuit in *Tex Tan Welhausen Co.* v. *N.L.R.B.*, 419 F. 2d 1265, 1271 (5th Cir. 1969), *vacated on other grounds*, 397 U.S. 819 (1970), *modified on other grounds*, 434 F. 2d 405, that the burden on the employer prescribed in *Great Dane* arises once it is established that the employer engaged in conduct which adversely affected employee rights, regardless of whether that conduct was discriminatory under Section 8(a) (3) or merely coercive or restraining under Section 8(a) (1). Appendix A, p. 22).

Unquestionably, in so holding, the Court is putting the "cart before the horse". The Supreme Court stated in *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26, 34 (1967):

> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's *discriminatory conduct* was inherently destructive of important employee rights, no proof of anti-union motivation is needed, and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by

> business considerations. Second, if the adverse effect of the *discriminatory conduct* on employee rights is comparatively slight, an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been *proved* that the employer engaged in *discriminatory conduct* which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is accessible to him. (Emphasis added)

It is clear under *Great Dane* that the National Labor Relations Board and the Court of Appeals must establish, not assert, that the employer's conduct was discriminatory before requiring proof of legitimate motivation for the employer's conduct.

The Board has jurisdiction to interpret relevant provisions of a collective bargaining agreement when they are raised as a defense to unfair labor practice charges and where such an interpretation is necessary for resolution of the charge. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, supra, *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967). However, the Sixth Circuit held that:

> . . . the Board properly declined to interpret the relevant provisions of the contract upon their finding that the evidence supports the unfair labor practice totally apart from the question of the company's legal obligation under the contract. (Appendix A, p. 24 N. 11)

This is an incongruous position in lieu of the facts. The Petitioner's conduct in withholding vacation benefits through application of contractual provision, and the treating of those benefits as a nonlegal obligation and as a negotiable item, is not per se discriminatory conduct where the Petitioner's conduct is unmistakenly grounded of applica-

tion of the contractual provisions. Refusal to consider the contract language merely circumvents the major issue which is the heart of the Petitioner's position.

The Court of Appeals has neglected to establish the first essential prerequisite to finding the employer in violation of the Act. It has merely charged discriminatory conduct, refusing to recognize that no contractual obligation to pay vacation benefits existed under an expired contract, with termination provisions releasing both parties unconditionally from the terms and conditions of the contract.

The National Labor Relations Board has said in the *Roegelein* case, supra, that unambiguous restrictive contract language negotiated between the employer and Union that subsequently affects strikers is not discriminatory.

> Losses incurred by strikers stemmed from good faith collective bargaining between Respondent and the statutory representative of alleged discriminatees. Accordingly, Respondent's action could hardly be viewed as conduct discouraging Union activity in any proscribed sense . . .

The record is devoid of any evidence that the employer's motive in withholding vacation benefits was, in fact, discriminatory or intended to be so. Johnson indicated in his testimony that the withholding of vacation benefits to discourage Union membership never occurred to him. His action stems only from the interpretation of his expired contract. In *N.L.R.B.* v. *Duncan Foundry & Machine Works*, 435 F. 2d 612, F.N. 8 (C.A. 7, 1970), the Court said that the employer was under no duty to apply the terms of an expired contract; but if so applied, the terms of the contract must be applied in a nondiscriminatory manner. Mr. Johnson did not apply the terms of his expired contract and his nonapplication was totally consistent.

The Court's holding that the Petitioner's attempt to set off is legal costs in conjunction with strike activity, against vacation monies was not a legitimate objective so as to satisfy the Company's burden under *Great Dane* assumes a finding of some type of discrimination on the part of the Petitioner and wrongfully assumes that vacation rights had accrued at all. Arguing that denial of vacation benefits is conduct inherently destructive of the rights of striking employees without establishing proof in support of the allegations and by ignoring clear contract language, the Sixth Circuit is creating post hoc rationale improving on and expanding the ruling in *Great Dane*.

The action taken by the employer in the case was totally legitimate and based exclusively on the provisions set forth in the collective bargaining agreement. No coercion or discrimination took place, and the record is void of any intent on the part of the employer to affect any such coercion or discrimination.

The Sixth Circuit's decision clearly has significance beyond the facts of this case. It extinguishes an individual employer's power through collective bargaining process to define and put in proper perspective his rights and obligation under a collective bargaining agreement, particularly in relation to fringe benefits. If the Courts refuse to uphold provisions of collective bargaining agreements which establish rights of the respective parties in labor relations, then the very foundation of our National Labor Relations Policy, which has traditionally recognized the sanctity of collective bargaining agreements is doomed to crumble.

In short, the decision of the Court of Appeals in inferring illegal conduct on the part of the Petitioner, in improperly expanding the clear rule of *Great Dane*, and refusing to recognize the Petitioner's conduct to be the lawful imple-

mentation of a right acquired through the collective bargaining process, has taken a precarious step in the direction of total destruction of the collective bargaining agreement as the viable superstructure in modern labor relations.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

CRAIG A. MILLER

BERNARD J. MOSER

GEMRICH, MOSER, DOMBROWSKI,
BOWSER & GARVEY
222 South Westnedge Avenue
Kalamazoo, Michigan 49006

Attorneys for Petitioner,
Jemco, Inc.

APPENDIX A

No. 71-1837

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

National Labor Relations Board,
Petitioner,

v.

Jemco, Inc.,
Respondent.

Decided and filed August 15, 1972.

Before: Celebrezze and Peck, Circuit Judges, and Rubin,* District Judge.

Celebrezze, Circuit Judge. This case is before us on the petition of the National Labor Relations Board (hereinafter the Board) for enforcement of its order entered against Respondent, Jemco, Inc. (hereinafter the Company), on April 28, 1971, prescribing certain prohibitive and affirmative relief with respect to the Company's denial of vacation pay to its striking employees. The Board found that denial to be in violation of Sections 8(a) (1) and 8(a) (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a) (1) and 158(a) (3). The Board's decision and order are reported in 190 NLRB No. 36, 1971 CCH NLRB Decs. ¶ 22,983, at 29,738.

The Company is a Michigan corporation engaged in the business of precision machining in the city of Buchanan,

*The Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

Michigan. The United Steelworkers of America, AFL-CIO, (hereinafter the Union) has represented the Company's production and maintenance employees at all times since the Company purchased the business some 5 years prior to the present dispute. There had been no strikes at the Company prior to that involved in the present dispute.

In 1969 the Company and the Union entered into a 3-year collective bargaining agreement, one provision of which provided for a wage reopener on 60 days' notice prior to May 1, 1970. Exercising this option, the Union reopened the contract. When no agreement had been reached by May 1, 1970,[1] the Union called a strike which remained in effect at the date of the Trial Examiner's hearing on December 10. All 14 of the Company's production and maintenance employees struck, although it appears from the record (and the parties agree) that one employee returned to work for a brief period.

Early in the strike the Company sought and obtained an injunction in a state court against certain picket line activity. The Company also filed a damage suit against the Union, which had not been resolved at the time of the Trial Examiner's hearing.

On July 3, Union Representative Halstead wrote to the Company's president, Mr. Johnson, requesting that the Company pay vacation monies to the striking employees who qualified for those benefits under the 1969 contract. In a reply letter, Mr. Johnson refused to pay these vacation benefits on the ground that the Company was not legally obligated to do so.

At a negotiating session held before a state mediator on August 10, Mr. Johnson stated that the costs to the Company for legal action necessary to stop unlawful picket line

[1] Unless otherwise indicated, all dates hereafter refer to 1970.

activity amounted to $1200[3] and that he was prepared to negotiate vacation pay against these costs. The dispute over vacation benefits remained unresolved after a meeting on October 27, and the Union subsequently filed the present unfair labor practice charge.[5]

After conducting a full hearing on the charge, the Trial Examiner found that the Company's refusal to pay vacation benefits to the employees was coercive and discriminatory under Sections 8(a) (1) and 8 (a) (3) and that the Company had failed to meet its resulting burden of showing that there existed "legitimate and substantial business justifications for the conduct." *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The Board adopted the findings and recommended order[4] of the Trial Examiner. That order requires the Company to cease and desist its denial of vacation pay (and any other coercive or discriminatory conduct) and further requires that vacation benefits be paid to qualified employees.

In *NLRB* v. *Great Dane Trailers, Inc., supra*, which served as the basis for the Trial Examiner's decision, the Supreme Court imposed the following burden on an employer:

> "[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is

---

[3] At a later negotiating session, Mr. Johnson reduced this figure to $1100.

[5] The complaint asserted as an additional unfair labor practice the Company's discriminatory discharge of probationary employees. The Trial Examiner, however, found that claim to be without merit, and dismissed that aspect of the complaint.

[4] The Board modified the Trial Examiner's recommended order only with respect to the date on which eligibility for vacation pay shall be determined. Whereas the Trial Examiner's recommended order required the Company to pay vacation benefits due on or after June 1, the Board's modified order requires payment of these benefits which were due on or after July 1, with interest from that date.

upon the employer to establish that he was motivated by legitimate objectives . . . . " 388 U.S. at 34.[8]

We find no merit in the Company's attempt to remove itself from the burden prescribed in *Great Dane* by arguing that the Board failed to prove that the Company engaged in *discriminatory conduct* which adversely affected employee rights. The Company asserts that there could be no finding of discrimination when all employees were treated alike under the Company's refusal to pay vacation benefits. This argument ignores the fact that all employee's who otherwise qualified for vacation pay engaged in a protected, concerted activity by going on strike.[9] As the Supreme Court observed in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233 (1963),

> "[u]nder § 8(a) (3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities, *Radio Officers* v. *Labor Board* 347 U.S. 17, 39-40, such as a legitimate strike. *Labor Board* v. *Wheeling*

---

[8] The *Great Dane* opinion contains language respecting the Board's burden of proving an antiunion motive after the employer has come forward with evidence of legitimate and substantial business justifications for conduct which has a "comparatively slight" adverse effect on employee rights, and the absence of such a burden upon the Board if the employer's conduct was "inherently destructive" of important employee rights. 388 U.S. at 34. This language, however, should not be confused with the actual holding of the *Great Dane* case, as set forth in the text. *See* 388 U.S. at 34 (stating that the Court found it unnecessary to decide the degree to which the challenged conduct in *Great Dane* adversely affected employee rights, since the company had failed to come forth with evidence of legitimate motives for its discriminatory conduct).

[9] The Company emphasizes that one employee who abandoned the strike and returned to work for a short time was denied vacation pay along with the other employees who remained on strike. The record does not establish that this employee was denied vacation, but even if that was the case, it would not detract from the fact that all employees initially engaged in protected activity by going on strike.

Pipe Line, Inc., 229 F. 2d 391; *Republic Steel Corp.* v. *Labor Board*, 114 F. 2d 820."

See also NLRB v. *Great Dane Trailers, Inc.*, *supra*, 388 U.S. at 32.

Although we are not referred to, nor do we find, any cases involving Section 8(a) (3) discrimination where all employees alike were denied an employment benefit, we do not believe that unequal treatment of different classes of employees is a prerequisite to finding a Section 8(a) (3) violation where all employees engaged in a concerted activity.[7] The interpretation of Section 8(a) (3) which the Company urges us to adopt would lead to the somewhat absurd result that an employer could never be found in violation of that Section so long as he was careful to treat all employees alike, no matter how destructive of employee rights his conduct may be. The Section 8(a) (3) discrimination in the present case lies in the employment benefit afforded to all employees prior to their engaging in a concerted activity and the benefit which was denied to all employees after they engaged in such an activity.

We conclude that the Board could and did properly find that the Company's denial of vacation pay to all employees in the wake of their first strike in the history of the Company was "discriminatory conduct which could have adversely affected employee rights to *some* extent," when

---

[7] It is noteworthy that our determination that the Board properly applied Section 8(a) (3) in the present case is not a prerequisite to our enforcement of the affirmative relief and the portion of the prohibitive remedy respecting the Company's Section 8(a) (1) conduct, as required under the Board's order. We believe, as did the Court of Appeals for the Fifth Circuit in *Tex Tan Welhausen Co.* v. *NLRB*, 419 F. 2d 1265, 1271 (5th Cir. 1969), *vacated on other grounds*, 397 U.S. 819 (1970), *modified on other grounds*, 434 F. 2d 405, that the burden on the employer prescribed in *Great Dane* arises once it is established that the employer engaged in conduct which adversely affected employee rights, regardless of whether that conduct was discriminatory under Section 8(a) (3) or merely coercive or restraining under Section 8(a) (1).

vacation benefits had been paid every year prior to the strike.[8] The burden was therefore upon the Company to "establish that [it] was motivated by legitimate objectives" in denying vacation benefits to the striking employees.

The Company attempts to justify its denial of the vacation pay by asserting that it had no legal obligation under the contract to pay the vacation benefits prescribed therein. In support of this position, the Company relies upon the following provisions of the contract: 1) Article XXII, Section 2,[9] which provided that all obligations under the contract were to terminate when the parties were unable to agree upon terms for continuation of the contract by May 1, after the contract had been reopened for wage negotiations; and 2) Article XVI, Section 2,[10] which pro-

---

[8] The Board's finding that the Company's denial of vacation benefits was discriminatory conduct within the terms of *Great Dane* is in no way negated by the Company's contention that vacation benefits were paid in prior years under the terms of an operative contract, whereas the contract had assertedly terminated prior to the denial of vacation benefits in 1970. The contract provisions upon which the Company relies to justify its denial of vacation benefits must be taken simply as the Company's attempt to meet its burden of showing that its discriminatory conduct was motivated by legitimate and substantial business objectives. The Company's contractual defense, however meritorious it may be, does not detract from the Board's initial finding that the Company's conduct was discriminatory.

[9] "Article XXII, Section 2: The foregoing notwithstanding, either party hereto may elect to reopen this Agreement for the purpose of negotiating changes in the wage rates in Exhibit "A" hereof by notification to the other in writing at least sixty (60) calendar days prior to April 30, 1970, and/or April 30, 1971. In the event that the contract is reopened in accordance with this Section and the parties are unable to agree upon the terms for continuation of this Agreement, then effective May 1, 1970, and/or May 1, 1971, as the case may be, all of the terms and conditions set forth in this Agreement shall cease to have effect and neither party shall be bound thereby."

[10] After setting forth the number of weeks of vacation and the percentage of annual earnings to which employees with specified years of seniority would be entitled as vacation benefits, Article XVI, Section 2, provided as follows:

"To qualify for a vacation and vacation pay the employee must be in the active employ of the company as of June 30 of the year in which

vided *inter alia* that vacations were not to be considered a "vested interest."

The Trial Examiner, however, found that apart from the question of the Company's legal obligation under the contract to pay the vacation benefits, the Company had failed to meet its burden under *Great Dane*. The Trial Examiner and the Board thus declined to interpret the relevant provisions of the contract.[11] The question before us, therefore, is whether there is substantial evidence to support the Board's findings even if we assume that the contractual provisions which the Company raises as a defense support the Company's contention that it had no legal obligation to pay the vacation benefits.

At a hearing before the Trial Examiner, the Company's president, Mr. Johnson, consistently asserted that the Company was not legally obligated to pay vacation benefits but that vacation pay was a negotiable item against which the Company would set off its legal expenses incurred in obtaining the injunction against unlawful picket line activity: "I have used this argument in every session that we have had; that my costs – legal costs, because of their unlawful acts on the picket line – are [the] union's expense, and I was negotiating those costs against the vacation pay."

---

the vacation is scheduled and must have worked at least 1,200 hours during the year. In no case shall vacations be considered a vested interest."

[11] Notwithstanding the provisions of Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, it is now clear that the Board has jurisdiction to interpret the relevant provisions of a collective bargaining agreement when they are raised as a defense to an unfair labor practice charge and such interpretation is necessary for a resolution of the charge. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 30-31 n. 7 (1967); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In the present case, however, we believe the Trial Examiner and the Board properly declined to interpret the relevant provisions of the contract upon their finding that the evidence supported the unfair labor practice totally apart from the question of the Company's legal obligation under the contract.

Mr. Johnson, however, never asserted that the contract was void nor that the vacation benefits would not be paid. Rather, he simply asserted that the Company was not automatically obligated to pay the vacation benefits and it could "negotiate [its] way out of it." Mr. Johnson always indicated his intent to pay the vacation benefits, but only after the Company was "made whole" for its legal costs. He testified that the Company would pay the vacation benefits (presumably in full) if it was successful in its damage suit against the Union.

At the negotiating sessions prior to the filing of the present unfair labor charge, the Union thus was not met with a simple denial of vacation benefits based on the above contractual provisions. Rather, the Company consistently asserted its intent to effectuate a set off of its legal costs prior to the payment of those benefits. In view of this evidence of the Company's position respecting the vacation pay, we find that the Trial Examiner correctly determined that the real issue before him was not whether the Company had a legal obligation under the contract to pay the vacation benefits, but rather the question of whether the Company's attempt to set off its legal costs against vacation monies which had otherwise accrued under the contract constituted a legitimate objective so as to satisfy the Company's burden under *Great Dane*.

We find substantial evidence to support the Trial Examiner's conclusion that the Company's attempt to set off its legal costs against the employees' vacation pay did not constitute a legitimate objective as required under *Great Dane*. As noted by the Trial Examiner, the Company failed to establish any legal basis for the proposition that the striking employees could be held personally liable for any such legal costs. Indeed, the Company's damage suit in the state court was brought against the Union to recover monies from its treasury for the Company's legal costs and other

expenses arising from the allegedly unlawful picket line activities. Nonetheless, Mr. Johnson attempted to justify the denial of vacation benefits from the employees personally as an alternate method of recovering the same legal costs.

Moreover, although Mr. Johnson at one point asserted that all employees who were entitled to vacation pay were participants in the acts which caused the legal expenses, at another point he acknowledged that some of the fourteen employees had "dropped off" from the picket line activity. Mr. Johnson further stated that his information as to who were the actual participants had come from telephone calls rather than from personal observation. He nonetheless asserted the Company's legal costs as a justification for denying vacation pay to all employees.

We thus find that apart from the question of Company's legal obligation to pay the vacation benefits under the contract, there is substantial evidence on the record as a whole to support the Board's conclusion that the Company's attempt to set off the above legal costs did not constitute a legitimate and substantial business justification for its denial of those benefits. In view of this evidence supporting the Board's determination that the Company had failed to meet its burden under *Great Dane*, the Board could properly conclude that the Company had violated Sections 8(a)(1) and 8(a)(3) by denying vacation pay to its qualified employees.

We therefore enforce the Board's order.

APPENDIX B

DECISION AND ORDER ISSUED BY THE NATIONAL LABOR RELATIONS BOARD

Dated April 28, 1971

On January 25, 1971, Trial Examiner Paul E. Weil issued his Decision in this proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner[1] as modified below.

---

[1] Respondent excepts to the finding in section 1 of the Trial Examiner's Decision that Respondent annually causes to be shipped to its Michigan plant goods and materials valued in excess of $50,000 from points outside the State. Since Respondent denied this allegation in its answer to the complaint and no evidence was adduced on this point, we do not rely on this finding.

Respondent also excepts to the Trial Examiner's finding at fn. 4 that it

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, Jemo, Inc., Buchanan, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order as herein modified:

1. Delete from paragraph 2(a) of the Order the word "June" and substitute "July" therefor, and add "with interest from on or after that date."

2. Substitute the attached Appendix for the Trial Examiner's Appendix referred to in paragraph 2(b) of the Order.

Dated, Washington, D.C., April 28, 1971.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

admitted that vacation pay was withheld from some employees who were not involved in the activities which gave rise to the injunction. Examination of Respondent's testimony on this point reveals that, although it can be given this interpretation, it does not compel this conclusion and thus is something less than an admission. We do not rely on the Trial Examiner's finding that Respondent admitted that it had withheld vacation pay from employees who had not participated in the activities in question.

Additionally, Respondent excepts to the Trial Examiner's finding that interest on vacation pay is due from June 1, 1970. Since the contract provides that eligibility for vacation pay shall be determined as of June 30, we find merit to this exception and shall modify the Order accordingly.

[Filed January 25, 1971]

APPENDIX C

TRIAL EXAMINER'S DECISION
STATEMENT OF THE CASE

PAUL E. WEIL, Trial Examiner: On August 11, 1970, United Steelworkers of America, AFL-CIO, hereinafter called the Union, filed a charge with the Regional Director for Region 7 (Detroit, Michigan), of the National Labor Relations Board, hereinafter called the Board, alleging that Jemco, Inc., hereinafter called Respondent, violated the National Labor Relations Act, as amended, by refusing to pay vacation benefits to striking employees. On October 14, 1970, said Regional Director on behalf of the General Counsel issued a complaint and notice of hearing alleging that by its refusal to pay vacation pay to its striking employees and by discharging its striking probationary employees Respondent violated Section 8 (a)(3) and (1) of the Act. Respondent by its answer admitted various facts and denied others, denied the commission of any unfair labor practices and denied that there is any vacation pay accrued to the striking employees. On the issues thus joined I conducted a hearing in Niles, Michigan, on December 10, 1970, at which all parties were represented, had an opportunity to adduce relevant and material evidence, to call, examine, and cross-examine witnesses, to argue on the record and to file briefs. A brief was received from Respondent.

On the entire record of this case and in consideration of the brief, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent is a Michigan corporation engaged in the business of precision machining in the city of Buchanan, Michigan. Respondent annually causes to be transported to its plant from points located outside the State of Michigan goods and materials valued in excess of $50,000 and annually ships from its Buchanan, Michigan, plant to points located outside the State of Michigan products valued in excess of $50,000.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The Union has represented Respondent's employees at all times since Respondent purchased the business some 5 years ago. In 1969 Respondent and the Union entered into a contract for a period of 3 years. A provision of the contract provided for a wage reopener on 60 days' notice prior to May 1, 1970. Notice was given by the Union and, no agreement having been reached by May 1, the Union called a strike which was still effective at the time of the hearing. Early in the strike, at the instigation of Respondent, an injunction was issued by a local court against unlawful picket line activity. At some time thereafter or at the same time a suit for damages was filed against the Union by Respondent.

On August 11[1] the parties met in the presence of a mediator to negotiate. At this meeting the Union proposed that on the conclusion of the strike all probationary employees should return on a seniority basis.[2] According to the testimony of Union Business Agent Halstead, Herbert Johnson, Respondent's president, stated that the probationary employees were terminated. According to the testimony of employee Vernon Vincent, Mr. Johnson said that as far as he was concerned the probationary employees were fired; that was academic. Although pressed to state in words what he said on that occasion President Johnson as a witness merely said that he rejected the Union's demand. However, he gave as his explanation of the situation the fact that none of the four probationers to whom the Union had reference occupied that status any more: one was no longer a probationer but had achieved seniority several days before the strike commenced, a second he understood to have gone in the Navy and he had seen neither of the other two since early in May and concluded that they had other jobs and were no longer interested. I conclude that what Johnson said was not that he had discharged the probationers but in substance that they were terminated, *i.e.*, by their own conduct, and that any discussion of their future with the Respondent was academic because the man in the Navy had re-employment rights under the law, the second man was no longer a probationer and the demand was not applicable to him and the other two had abandoned their employment. He stated on the witness stand that if the probationers returned he was prepared to take them back as probationers to work out their 50 days of probationary employment. The statement attributed to Mr. Johnson by em-

---

[1] All dates herein are in the year 1970 unless otherwise specified.

[2] The contract provided that new employees remain in a probationary status for the first 50 days of work.

ployee Vincent that the issue was academic supports this conclusion.

On July 3, 1970, Union Representative Halstead wrote to Respondent requesting payment of vacation pay under the terms of the contract. On July 21 President Johnson wrote to the Union that payment of vacation pay was refused because Respondent was not "legally obligated for payment of vacation pay." At the negotiation session on August 11 Johnson stated that the cost of the legal action necessary to stop unlawful picket line activity was $1,200[3] and he was prepared to negotiate vacation pay against this cost to reimburse Respondent for its expenditure necessitated by the Union's action. At the hearing President Johnson stated that he is not automatically obligated to pay vacation pay but it is a negotiable item and pointed out that the contract says that vacation pay is not a vested interest. He also stated that if he pursues his damage suit and collects his expenditure of $1,100 under that he will then pay the vacation pay because he will be made whole on what he had suffered because of the illegal acts by the Union.

DISCUSSION AND CONCLUSIONS

1. With regard to the probationary employees, in the light of Respondent's statement at the hearing and of the conclusions reached above with regard to Respondent's statements in negotiation, I conclude that no discrimination took place, the probationary employees have not been discharged and Respondent proposes to reinstate any who appear after the strike. Accordingly, no discrimination has taken place, no violation exists and I shall recommend that the complaint be dismissed with regard to this allegation.

---

[3] At a later negotiating session he lowered the figure to $1,100.

2. With regard to the vacation pay issue Respondent does not deny that vacation pay had accrued to the 14 employees who went on strike but contends that it remained at all times negotiable and that he proposed to negotiate it as a setoff against his legal costs.

Whether or not the contract under which the Union demanded payment of vaction pay had terminated as a result of its own provisions is an issue that need not be reached herein. The record is clear that vacations were a customary condition of employment and Respondent at no time has negotiated with a view to removing them as such. Respondent does not contend that the contract is void, but on the contrary stated at the trial that it proposes to live up to the contract which it takes seriously. The issue really boils down to the question whether Respondent has a right to set off its legal expenses against the money owing the employees as vacation pay. Under the circumstances of this case where no evidence is adduced as to the amount of vacation pay or as to the costs said to set off against them and where such costs have not, at least to the time of this hearing, been reduced to any final figure, a setoff cannot really be effectuated. In addition there is no showing that the individuals to whom vacation pay is owed are individuals who were responsible for or guilty of any unlawful acts which necessitated the expenditure of legal fees or that under any law they may be held personally responsible for reimbursement to the Employer of such expended moneys.

In *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, the Supreme Court held that the employer's refusal therein to pay vacation pay to striking employees was violative of Section 8(a)(3) of the Act and laid down several principles distilled from its review of the controlling decisions in the field. One such principle as stated by the Court is as follows:

> . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that [it] was motivated by legitimate objectives since proof of motivation is most accessible to him.

The Employer herein has in my opinion failed to meet the burden laid down by the Supreme Court in the *Great Dane* case. Elsewhere therein the Court spoke of the need for the employer to come forth with evidence of "legitimate and substantial business justifications for the conduct." In my opinion in the present state of the case the Employer's alleged justification is neither legitimate nor substantial and I conclude therefrom that by its withholding of vacation pay from its striking employees solely because they were on strike[4] Respondent has violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action found necessary to effectuate the policies of the Act. Having found that Respondent discriminatorily withheld from certain of its employees vacation pay for which they had qualified under the terms of the contract between the Respondent and the Union, it will be required to pay to each such employee the vacation pay so withheld. The amount due to each employee shall bear interest at the rate of 6 percent per annum from June 1, 1970, the date after

---

[4] The Employer admitted on the witness stand that some of the employees from whom vacation pay had been withheld were not involved in the activities which gave rise to the injunction.

which such vacation pay was payable under provisions of the contract, until paid. It will also be recommended that Respondent shall, upon request, make available to the Board or its agents, for inspection and reproduction, all books and records necessary or helpful in determining the identity of employees to whom vacation pay is due as herein provided and in computing the amount thereof.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding vacation pay from its employees as set forth above Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a) (3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. It has not been established by a preponderance of the evidence that Respondent discharged probationary employees and that allegation of the complaint should be dismissed.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommendation:[6]

---

[6] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein

ORDER

Respondent, Jemco, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Withholding vacation pay from or in any other manner discriminating against its employees in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which has been found as necessary to effectuate the policies of the Act:

(a) Forthwith pay to each employee on its payroll who qualified for vacation pay under the terms of the agreement between Respondent Jemco, Inc., and United Steelworkers of America, AFL-CIO, the vacation pay due on or after June 1, 1970, as it is provided in the aforesaid contract.

(b) Post at its plant in Buchanan, Michigan, copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt there-

---

shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

* In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

of, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board or its agents, for inspection and reproduction, all records and books necessary or helpful in determining the identity of the employees to whom vacation pay is due as provided herein and in computing the amount thereof.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[1]

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges a discriminatory discharge of the probationary employees.

Dated, Washington, D.C., January 25, 1971.

CERTIFIED TRUE COPY
O. W. FIELDS
EXECUTIVE SECRETARY, NLRB
Date: January 25, 1971

[1] In the event that this Recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-697

JEMCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. During the spring of 1970, the United Steelworkers of America, AFL-CIO, which represents the production and maintenance employees of the Company, a precision machining enterprise, requested negotiations under the wage reopener clause of the then current, three-year contract (Pet. App. 30). On May 1, no agreement having been reached, all 14 of the employees went out on strike (*ibid.*). The contract provided that employees "in the active employ of the company" as of June 30, who had worked at least 1,200 hours during the year, were entitled to a certain percentage of their

earnings in the previous calendar year as vacation pay (A. 55, 57).[1] Although the Company had paid vacation pay to its employees every year since it began operations, Company President Herbert O. Johnson refused the striking employees' request on the ground that the Company was not "legally obligated for payment of vacation pay" (Pet. App. 32; A. 50).[2] At a subsequent negotiating session, Johnson stated that Company legal costs incurred in injunction and damage proceedings against the Union amounted to $1,200,[3] and that, while not legally obligated to make vacation payments, he was prepared to negotiate vacation pay against these legal costs (Pet. App. 32; A. 21-26, 30-31).[4]

The Board found that, "[w]hether or not the contract under which the Union demanded vacation pay had terminated as a result of its own provisions," the record showed that "vacations were a customary condition of employment" and that the Company "at no time has negotiated with a view to removing them as

---

[1] "A." references are to the appendix in the court of appeals.

[2] Petitioner's theory is that the contract had terminated, thus extinguishing the Company's legal obligation to pay vacation pay.

[3] Early in the strike, the Company obtained an injunction in a state court against picket line misconduct. The Company also filed a suit against the Union to recover damages for such misconduct, which was unresolved at the time of the Board hearing. (Pet. App. 30; A. 21-23.)

[4] In his summation before the Trial Examiner, President Johnson added (A. 39):

> I will say that if I pursue my damage suit and collect under that then I will pay the vacation pay, because then I will be made whole on what I have suffered because of the illegal acts by the union.

such." The Company simply contended that it "has a right to set off its legal expenses against the money owing the employees as vacation pay." (Pet. App. 33.) Applying the principles enunciated in *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, the Board concluded that such a setoff demand was not a "legitimate and substantial" business justification for withholding accrued vacation pay from its striking employees, and that the Company thus violated Section 8(a)(3) and (1) of the Act by doing so (Pet. App. 34). The Board ordered the Company, *inter alia*, to pay to each employee the vacation pay due under the collective agreement (Pet. App. 36-37).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 18-26).

2. In *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, this Court held that an employer violated Section 8(a)(3) and (1) of the Act, when, without a legitimate and substantial business justification, he denied striking employees vacation benefits accrued under a terminated collective bargaining agreement, while continuing to pay such benefits to non-strikers. This case is controlled by *Great Dane*. Here, as there, striking employees were denied accrued vacation benefits which the Company would otherwise have paid them but for the fact that they had gone out on strike. In *Great Dane*, the employer came forward with no justification for thus discriminating against the strikers, whereas here he sought to justify that

discrimination[5] on the ground that misconduct occurring during the strike had caused him legal expenses which he was entitled to offset against the vacation benefits. The only question presented therefore is whether the Board and the court below correctly concluded that the offset of legal expenses was an insufficient justification for denying the strikers the full measure of their accrued vacation benefits.[6] This narrow issue does not warrant further review. In any event, the Board and the court below correctly concluded that the Company was not justified in penalizing its employees in order to recoup its legal expenses against the Union. As the court below stated (Pet. App. 25-26):

> * * * the Company's damage suit in the state court was brought against the Union to recover monies from its treasury for the Company's legal costs and other expenses arising from the allegedly unlawful picket line activities. Nevertheless, Mr.

---

[5] As the court below correctly concluded (Pet. App. 21-22), the fact that all of the strikers were treated alike does not bar a finding of discrimination where, as here, their strike activity was the basis for their adverse treatment.

[6] Contrary to the petitioner's contention (Pet. 8-12), it was not necessary to determine whether the Company was contractually obligated to pay the vacation benefits. The Board found, and the court below agreed (Pet. App. 24-26), that the Company fully intended to pay the vacation benefits if it were successful in recovering from the Union or offsetting the expenses of its law suits. *Roegelein Provision Co.*, 181 NLRB 578, relied on by petitioner (Pet. 10-12), is distinguishable. There the contract provision relating to loss of vacation benefits was specifically negotiated with the intention that it would apply to the then pending strike (*id.* at 580).

Johnson attempted to justify the denial of vacation benefits from the employees personally as an alternative method of recovering the same legal costs.

Moreover, the Company admitted that it did not know which employees actually participated in the alleged misconduct (Pet. App. 26), but nevertheless intended to penalize them all.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

DECEMBER 1972.

☆ U.S. Government Printing Office: 1972—491-021/377